

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ANICIA M. ROBINSON**  
Claimant

VS.

**LIFE CARE CENTER OF OSAWATOMIE**  
Respondent

AND

**TRAVELERS INSURANCE CO.**  
Insurance Carrier

Docket No. 1,007,783

**ORDER**

Claimant requests review of the February 11, 2004 Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

**ISSUES**

Claimant alleged that she injured her knee while lifting a patient at work for respondent. Initially, in a Nunc Pro Tunc Preliminary Decision dated February 27, 2003 the Administrative Law Judge (ALJ) found the claim compensable and that claimant gave timely notice but the ALJ reserved the issue of temporary total disability benefits until receipt of a medical report to be provided by an orthopedic surgeon. The Board reversed that Preliminary Decision finding claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment or that she provided timely notice of her accident.

A second preliminary hearing was scheduled and, although a hearing was apparently not conducted, the parties agreed to submit additional new evidence consisting of the deposition testimony of two witnesses taken on claimant's behalf. By Preliminary Decision dated February 11, 2004, which is the subject of this appeal, the ALJ denied claimant's current application. The ALJ found that claimant's issues had been decided adversely by the Board and therefore denied claimant's application.

The claimant requests review of whether the ALJ erred in denying compensability of this claim. Claimant argues the new evidence provided by the depositions of two witnesses corroborates her testimony that she suffered accidental injury at work for respondent and provided timely notice. Claimant further argues that the ALJ erred in determining he could not reconsider the issue of the compensability of the claim. Claimant requests that the claim be found compensable and medical treatment be provided as originally determined by the ALJ.

Respondent argues the claimant failed to meet her burden of proof that she suffered accidental injury or provided timely notice. Consequently, respondent argues the ALJ's Preliminary Decision should be affirmed. Respondent argues the ALJ's decision was not solely based upon a determination that he could not reconsider the issue of compensability of the claim. Respondent argues the ALJ considered the testimony of the new witnesses and noted that they were separated from employment with respondent under circumstances that prejudiced them against respondent. Thus, respondent argues the ALJ did not find the witnesses credible.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant alleged accidental injury on October 29, 2002, while attempting to transfer a patient from his Geri chair into a bed, she heard a pop in her right knee. Claimant named several witnesses who allegedly were made aware of her injury and complaints. With the exception of the RN supervisor, Retha Ross, who did not testify, none of respondent's employees supported claimant's allegations of an injury.

After a preliminary hearing the ALJ found the claim compensable and that claimant provided timely notice. Upon appeal, the Board reversed the ALJ's decision and noted the respondent's witnesses had contradicted claimant's testimony.

Claimant then requested a second preliminary hearing and the deposition testimony of two new witnesses, including the RN supervisor who had not testified at the first preliminary hearing, was submitted to the ALJ. The ALJ issued a Preliminary Decision dated February 11, 2004, which provided in pertinent part:

While it has been declared by the board that the number of preliminary hearings authorized in a given claim is not limited (matter of Terry Lee, Dkt. 181,291) that case did not authorize a rehearing on issues already addressed and determined adverse to the Claimant. Also, whether an examination now would yield the same insight into Claimant's injury and medical needs is doubtful.

For those reasons the current application is denied.

Although the ALJ commented upon the proffered deposition testimony, nonetheless, the ALJ never made factual findings based upon the evidence introduced at the preliminary hearing on January 29, 2004. Instead, the ALJ suggested that he did not have the authority to reconsider a Board decision entered on appeal from the first preliminary order.

An ALJ is not limited in the number of preliminary hearings that may be held in a case. It is within the sound discretion and authority of the ALJ to determine the number of preliminary hearings to be held and whether a prior preliminary hearing Order should be modified based on the evidence presented. Furthermore, the ALJ has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

A preliminary hearing is a summary proceeding and a decision based upon the evidence presented at such preliminary hearing, whether rendered by an ALJ or the Board upon appeal from a preliminary hearing, is not binding upon the parties but subject to a full hearing on the claim.<sup>1</sup> Because new evidence may materially alter the basis for a prior preliminary decision, whether made by an ALJ or the Board, such decisions are subject to change. Consequently, the ALJ had the authority to determine the issues raised at the second preliminary hearing.

The Board's authority on review from preliminary hearings is limited to certain jurisdictional issues determined by the ALJ.<sup>2</sup> Because the ALJ concluded he did not have authority, there were no factual findings made by the ALJ on the issues raised by claimant and respondent. Therefore, in the absence of fact findings, this matter should be remanded to the ALJ for further findings and orders on those and any other remaining issues.

The Board does not retain jurisdiction of this matter and, following any additional decisions by the ALJ, any aggrieved party must follow the appropriate measures in order to obtain additional review by the Board over these disputes.

**WHEREFORE**, it is the finding of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated February 11, 2004, is reversed and this matter is remanded to the ALJ for a determination of the remaining issues.

**IT IS SO ORDERED.**

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<sup>1</sup> K.S.A. 44-534a(a)(2) (Furse 2000).

<sup>2</sup> Id.

Dated this \_\_\_\_\_ day of April 2004.

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**BOARD MEMBER**

c: William L. Phalen, Attorney for Claimant  
Randall W. Schroer, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director